IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel. JEREMIAH W. NIXON, Attorney General, Relator, v. THE HONORABLE BYRON KINDER, Circuit Judge, 19th Judicial Circuit, Cole County, Respondent.	)	Cause No. SC 85633

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
NINTEENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE BYRON KINDER, SENIOR JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

Emmett D. Queener, MOBar #30603
Attorney for Respondent

3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594

INDEX

Page

TABLE OF AUTHORITIES

Page

***CASES*:**

***STATUTES*:**

***RULES*:**

JURISDICTIONAL STATEMENT

This is an action for a writ of prohibition against a judge of the Cole County Circuit Court. Cole County is within the geographic jurisdiction of the Western District Court of Appeals, and that Court has supervisory jurisdiction over the circuit courts. Article V, Section 4, Missouri Constitution (as amended 1982). Initial jurisdiction was in that Court. Section 477.070, RSMo 2000. The Missouri Supreme Court accepted this case on transfer after opinion, and now has jurisdiction. Article V, Section 10, Missouri Constitution.

STATEMENT OF FACTS

Relator filed a petition in the Circuit Court of Cole County to declare Jesse Moyers a sexually violent predator pursuant to Section 632.480, *et seq*, RSMo 2000 (Exhibit A). The Honorable Byron Kinder found probable cause to believe that Mr. Moyers is a sexually violent predator, and ordered a psychological examination pursuant to Section 632.489.4 (Exhibit B).

Dr. Steve Mandracchia of the Department of Mental Health was assigned to conduct the examination (Exhibit E). Dr. Mandracchia contacted Mr. Moyers' counsel on several occasions to inform her that Mr. Moyers was incompetent and could not assist in the examination (Exhibit E). Dr. Mandracchia's report to the court noted Mr. Moyers' history of psychiatric and behavioral difficulties including psychotic and affective disturbance, poor insight and judgment, and endangering behaviors (Exhibit E). In his most recent psychiatric evaluation in August of 2000, Mr. Moyers was uncooperative, agitated, tangential, emotional, and at one time, incoherent (Exhibit E). At times while detained, Mr. Moyers expressed delusional beliefs (Exhibit E). Dr. Mandracchia informed the court in his report that, "[i]n recent communications from personnel at the Missouri Sexual Offender Treatment Center [Mr. Moyers] has been described as

seriously psychiatrically disturbed." (Exhibit E). The doctor summarized his findings, "[Mr. Moyers] is a 54-year old male with an extensive history of psychiatric and behavioral instability whose recent/current functioning is described as acutely psychiatrically impaired." (Exhibit E).

Mr. Moyers' counsel requested a stay of the proceedings and a competency examination by Dr. Mandracchia (Exhibit C). The motion noted that if Mr. Moyers is unable to participate in treatment as a sexually violent predator, he would essentially be confined for the rest of his life (Exhibit C). Counsel also requested the examination because while appointed to assist Mr. Moyers, she could not effectively do so if he was incompetent and unable to assist in his case (Exhibit C).

Judge Kinder stayed the proceedings and ordered an examination of Mr. Moyers' competency to proceed to trial (Exhibit D). The judge ordered Dr. Mandracchia to determine whether Mr. Moyers lacked the capacity to understand the proceedings against him or assist in his own defense (Exhibit D). Judge Kinder ordered the parties to "provide the examiner any information required to be so provided under Chapter 552, and any other information requested by the examiner." (Exhibit D). The order also authorized the doctor to interview witnesses (Exhibit D).

Relator sought a writ in the Western District Court of Appeals to prohibit Judge Kinder from proceeding with any determination of Mr. Moyers' competency, arguing that Judge Kinder was trying "to import into the sexually violent predator statute the criminal code's provision for a competency examination." (Petition for Writ of Prohibition and Mandamus, page 1). Relator suggested that the Court should grant its request because this is a civil rather than criminal proceeding (Petition for Writ of Prohibition and Mandamus, page 3). Relator suggested that Mr. Moyers' interests in the sexually violent predator proceeding could be adequately protected by a guardian *ad litem* appointed under Rule 52.02(k) (Petition for Writ of Prohibition and Mandamus, page 3).

ARGUMENT

The Honorable Byron Kinder acted within his authority to stay the Sexually Violent Predator proceedings against Jessie Moyers and order an examination to determine whether Mr. Moyers can understand the proceedings and assist appointed counsel in the preparation of his defense. Mr. Moyers is given the assistance of counsel by Section 632.492, RSMo 2000, and that representation must be effective, which requires Mr. Moyers' ability to assist his counsel in a process through which he could lose his liberty for life.

In a proceeding for a writ of prohibition, there is a presumption that the actions of the trial judge were proper. ***State ex rel. Jackson County Prosecuting Attorney v. Moorehouse***, 70 S.W.3d 552, 554 (Mo. App., W.D. 2002). The burden, therefore, falls upon Relator to establish that Judge Kinder abused his discretion and that prohibition is appropriate. ***Id***. at 554. In ***State ex rel. Linthicum v. Calvin***, 57 S.W.3d 855, 856-857 (Mo. banc 2001), the Missouri Supreme Court stated: "Prohibition is a discretionary writ, and there is no right to have the writ issued. Prohibition will lie only to prevent

an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-judicial power."

The sole question for this Court is whether Judge Kinder exceeded his jurisdiction by ordering a competency examination in an SVP action. ***State ex rel Terminal R. Ass'n of St. Louis v. Tracey***, 140 S.W. 888, 891 (Mo. 1911). "In the application of the principle it matters not whether the court below has decided correctly or erroneously; its jurisdiction being conceded, prohibition will not go to prevent an erroneous exercise of the jurisdiction." ***Id***. Prohibition will not lie as long as Judge Kinder has jurisdiction over the cause and "all matters necessarily arising therein," whatever his decision might be on any point. ***Id***.

Judge Kinder has jurisdiction over this matter because it was filed in the Cole County Circuit Court. Section 632.492, RSMo 2000, provides that "at all stages of the proceedings pursuant to sections 632.480 to 632.513, any person subject to sections 632.480 to 632.513 shall be entitled to the assistance of counsel." Because Mr. Moyers has a right to counsel, Judge Kinder has the authority to order a competency examination to assure and protect Mr. Moyers' statutory and constitutional rights associated with counsel's representation.

The foundation of Relator's argument in support of the writ is that the SVP process is civil rather than criminal (Relator's Brief 8). Relator suggests that Judge Kinder acted as if Section 552.020, RSMo 2000, applied in the SVP case (Relator's Brief 8). He then argues that the statute applies only to a criminal proceeding (Relator's Brief 8).

In fact, Judge Kinder did not apply Section 552.020 to Mr. Moyers' case. Mr. Moyers did not ask for a mental examination pursuant to that section (Exhibit C). Judge Kinder did not order the examination pursuant to that statute (Exhibit D). He did direct Dr. Mandracchia to provide "an opinion based upon a reasonable degree of medical or psychological certainty as to whether [Mr. Moyers] lacks capacity to understand the proceedings against him or to assist in his own defense." (Exhibit D). The right to effective assistance of counsel attaches even to a civil proceeding.

The subject of an involuntary civil commitment proceeding has the right to effective assistance of counsel at all significant stages of the commitment process. ***Ex Parte Ullman***, 616 S.W.2d 278, 283 (Tx. App., 1981). Texas recognizes that this right applies to civil commitment under a sexually violent predator scheme. ***Beasley v. Molett***, 95 S.W.3d 590, 602-603

(Tx. App., 2002). The ***Ullman*** Court reached into the past to quote ***Clark v. Matthews***, 5 S.W.2d 221, 222 (Tx. App., 1928):

> The Constitution and the laws of Texas jealously protect the liberties of the citizens of the commonwealth, and throw about each citizen, sane or insane, the safeguards of being heard in person or by attorney, or both, …. If the rights of any class of persons should be more closely and sacredly guarded than another, it is that unfortunate individual who, rightfully or wrongfully, is charged with having a mind diseased or reason dethroned. The unfortunate or his friends have the right to insist upon compliance with every form prescribed by law, which has been enacted for the protection and preservation of his liberty.

Ex Parte Ullman, 616 S.W.2d at 284. Relator, to the contrary, wants to dispense with the requirement of effective assistance of counsel enacted for the protection and preservation of Mr. Moyers' liberty.

The United States Supreme Court ruled in ***In re Gault***, 387 U.S. 1, 26, 87 S.Ct. 1428, 1442, 18 L.Ed.2d 527 (1967), that the Fourteenth Amendment's procedural due process protection applies to juvenile delinquency proceedings long considered to be civil in nature. The Court

held that it is not the characterization of the proceedings which determines whether the constitutional guarantees normally utilized only in criminal matters apply, but rather what is at stake for the individual. ***Id***. At stake for Gault, and for Mr. Moyers, is the fundamental right to liberty. The Sixth and Fourteenth Amendments require the assistance of counsel as a matter of due process of law. ***State v. Dixon***, 916 S.W.2d 834, 835-836 (Mo. App., W.D. 1995). Section 632.492 guarantees Mr. Moyers assistance of counsel. Relator seeks to render that guarantee meaningless by eliminating the concomitant requirement that counsel provide *effective* assistance to Mr. Moyers.

State ex rel. Reed v. Frawley, 59 S.W.3d 496 (Mo. banc 2001), involved the question of competency of a juvenile for extradition. As pointed out above, a juvenile proceeding is labeled "civil." ***In re Gualt***, ***supra***. Nonetheless, this Court held that the effective assistance of counsel required by the due process clause also required that the juvenile be competent to assist counsel in the preparation to defend the matter at hand:

> A right to counsel is an "empty formality" if it is not also assumed that the assistance of counsel must be effective. ***In the Interest of J.C., Jr.***, 781 S.W.2d 226, 228 (Mo. App. 1989). Such a right

> becomes meaningless "as the sound of tinkling brass" if an accused lacks the mental capacity to knowingly and intelligently confer with counsel respecting the charges or issues brought against him and to assist counsel by means of supplying information pertinent to those issues. ***State ex rel. Vaugh v. Morgett***, 526 S.W.2d 434, 546 (Mo. App. 1975).

Frawley, 59 S.W.3d at 497. In ***Frawley*** this Court followed the reasoning in ***State ex rel. Juergens v. Cundiff***, 939 S.W.2d 381 (Mo. banc 1997). ***Frawley***, 59 S.W.3d at 498. The ***Juergens*** Court examined statutory language requiring due process of law for probationers before their probation is revoked. The Court noted that "the general assembly afforded these rights to probationers; therefore, it can hardly be imagined that the general assembly did not intend probationers to proceed to hearing without having the capacity to exercise them." ***Juergens***, 939 S.W.2d at 382. This Court held that the same reasoning applied to the juvenile extradition statute. ***Frawley***, 59 S.W.3d at 498. The Court concluded, "[f]or the general assembly's grant of a right to counsel to be meaningful in an extradition context, it must ensure that an accused has enough competence to understand the extradition proceeding and to assist counsel." ***Id***.

By the same token, for the legislature's grant of assistance of counsel in a sexually violent predator context to have meaning, it must ensure that Mr. Moyers and those like him have the competency "to understand the [] proceeding and to assist counsel by means of supplying information pertinent to those issues." ***Frawley***, 59 S.W.3d at 497. And while this Court might find it hard to imagine that the general assembly did not mean to provide Mr. Moyers certain rights without the capacity to exercise them, that is precisely the goal of Relator. It is Relator, not Judge Kinder, who "is seriously off course." (Relator's Br. 8).

It is certainly true that Judge Kinder directed the parties to provide Dr. Mandracchia "any information required to be so provided under Chapter 552, and any other information requested by the examiner." (Exhibit D). The reference to "Chapter 552" does not make Judge Kinder's order an exercise of authority under Section 552. 020, but simply instructs the parties to provide the doctor with the type of information considered by the legislature to be relevant to a determination of Mr. Moyers' competency to stand trial and assist counsel. To the extent that this mirrors methods employed in criminal proceedings, it harkens back to the words of the United States Supreme Court in ***In re Gault*** that it is not the

characterization of the proceedings which determines whether the constitutional guarantees *normally utilized only in criminal matters* apply, but rather what is at stake for the individual. The United States Supreme Court recognizes that constitutional guarantees normally occurring in criminal cases in some circumstances apply equally in a civil proceeding. At stake for Mr. Moyers is the fundamental right to liberty. Judge Kinder was well within his authority to order a determination of Mr. Moyers' competency to stand trial and assist counsel, and to direct the parties to resort to the methodology typically used in a criminal proceeding to determine that issue.

Relator suggests that "Rule 52.02 speaks specifically to the situation – alleged by Moyers' counsel here – where a 'person not having a duly appointed guardian is incapable by reason of a mental disease … of properly caring for the person's own interests in any litigation brought by or against such person.'" (Relator's Br. 11). But Relator then chastises Mr. Moyers for not seeking relief under Rule 52.02 suggesting that Mr. Moyers' "feels compelled to decline that option." (Relator's Br. 11). In fact, Relator initially sought to impose that rule on Mr. Moyers in Relator's Petition filed in the Western District Court of Appeals (Relator's Petition in Prohibition

and Mandamus, page 3). Judge Kinder's Answer to Relator's Petition fully explained why a guardian *ad litem* could not assist appointed counsel in a manner that would sufficiently protect Mr. Moyers' interests in an SVP case. A guardian *ad litem* could not provide the type of information or investigation of Mr. Moyer's past required to permit appointed counsel to effectively assist Mr. Moyers.

The Eastern District Court of Appeals rejected the notion that a guardian can fully protect the interests of a juvenile in a civil, juvenile court proceeding. ***In the Interest of D.L.***, 999 S.W.2d 291 (Mo. App., E.D. 1999). The juvenile and his mother waived counsel. ***Id***. at 293. The Eastern District noted that the presence of a parent or guardian with a juvenile did not diminish the trial court's duty to fully determine the validity of the waiver. ***Id***. at 295. The Court recognized that, "[t]he presence of a parent *or guardian*, with no training in the law, is no guarantee that a child will be fully informed or meaningfully represented." ***Id***. (emphasis added).

Relator dropped the suggestion in his initial brief that appointment of a guardian *ad litem* under Rule 52.02(k) will effectively protect Mr. Moyers' interests. Instead, Relator argued that the State would suffer irreparable

harm if Judge Kinder is not stopped. Relator complains that Judge Kinder's approach precludes the State from seeking Mr. Moyers' commitment, leaving only the option of Mr. Moyer's release (Relator's Br. 10). Relator's complaint derives from ***Jackson v. Indiana***, 406 U.S. 715 (1972) (Relator's Br. 10). The United States Supreme Court held that a person charged with a crime and who is committed on account of incapacity to proceed to trial could be held for a reasonable time to determine the probability that the person could regain competency. ***Id***. at 378. The Court further held that if it is determined that the person will not regain competency, "then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." ***Id***. Relator argues from this that if Mr. Moyers is found incompetent to stand trial or assist counsel in the SVP proceeding as a result of Judge Kinder's order, Relator will be denied the opportunity to commit Mr. Moyers as a sexually violent predator, and will have to release him (Relator's Br. 9-10). Relator complains that Judge Kinder's position, "would necessarily eliminate the civil commitment option from the Jackson rule and from 552.020.11 - again thus providing freedom to anyone lucky

enough to establish incompetency to stand trial, regardless of the threat they pose to the public." (Relator's Br. 12).

Relator's argument must fail because it is based on a fallacy. His argument seems to suggest that the commitment provided by the SVP statutes is the "customary civil commitment proceeding" required by the United States Supreme Court (Relator's Br. 10). In the ***Jackson*** analogy, the SVP proceeding would be in the position of the criminal trial. In ***Jackson***, the state lost the possibility to incarcerate the defendant for commission of a crime because he was incompetent to stand trial for the crime. In Mr. Moyer's case, Relator may be unable to commit Mr. Moyer's as an SVP if he is incompetent to stand trial on those allegations. But Relator suffers no greater harm from ***Jackson*** than did the State of Indiana. The "customary civil commitment proceeding that would be required to commit indefinitely any other citizen," described by the United States Supreme Court is available to the State in the general civil commitment statutes 632.300 to 632.475.

Relator may fall back upon the usual mantra that the SVP proceeding is "civil" to argue that he need not suffer the fate of Indiana in that criminal situation. That effort, too, is unavailing. In ***Jackson*** the United States

Supreme Court applied the reasoning of its earlier case ***Baxstrom v. Herold***, 383 U.S. 107 (1966). In reaching its decision in ***Jackson***, the Court noted, "Baxtrom did not deal with the standard for release, but its rational is applicable here." 406 U.S. at 729. The ***Baxstrom*** case involved different treatment of persons committed under different *civil* statutes. 383 U.S. 109-110. If a comparison of civil statutes was adequate for the United States Supreme Court to consider the results under civil or criminal statutes, the rational of ***Jackson*** should be equally applicable to this situation involving civil statutes.

After Judge Kinder pointed out in his initial brief in the Western District Court of Appeals the fallacy of Relator's argument that appointment of a guardian under Rule 52.02(k) would adequately protect Mr. Moyer's interests, Relator revived the argument in his Reply Brief (Relator's Reply Br. 4-5). Returning to this argument remains unavailing. Relator begins by asserting that ***Frawley***, ***supra***., was a *criminal* case because the question involved was extradition, and this Court's holding in that case does not apply to this civil matter (Relator's Br. 5). Relator ignores that Reed was a juvenile, and therefore the underlying juvenile proceeding was *civil*. ***In re Gault***, 387 U.S. 1, 26, 87 S.Ct. 1428, 1442, 18 L.Ed.2d 527

(1967). The juvenile argued that he had a state and federal constitutional right to be competent to participate in the extradition hearing. ***Frawley***, 59 S.W.3d at 498. This Court held that the question in ***Frawley*** was controlled by Section 548.101, RSMo 2000, and it was unnecessary to reach any other issues. ***Id***. Chapter 548, Extradition, is contained in Title XXXVII, Criminal Procedure. But the extradition hearing, and the competency hearing this Court required, was proceeding in the juvenile division of the St. Louis City circuit court. ***Id***. This Court did not require a finding of the juvenile's competency under Chapter 552, nor did it base its decision on the constitutional right of criminal defendant not to be tried and convicted if incompetent. The Court found the juvenile's right to be competent from the statutory language permitting him "to demand and procure legal counsel." ***Id***. It was the concomitant right to *effective* assistance of such counsel achieved through the juvenile's understanding of the proceedings and ability to assist counsel that necessitated a finding of competency before the extradition could proceed. By the same token, Section 632.492 provides that "at all stages of the proceedings … any person subject to [the SVP law] shall be entitled to the assistance of counsel." Mr. Moyers is as entitled to

be competent during this proceeding as was Reed during the extradition proceeding in juvenile court.

Relator incorrectly asserts that "Moyers has effective counsel (unlike the juvenile in *D.L.*), and he is entitled to a guardian ad litem under Rule 52.02 (unlike the alleged fugitive in *Frawley*), who can stand in Moyer's shoes in assisting counsel." (Relator's Reply Br. 5). Counsel's "effectiveness" was not at issue in ***D.L.***, the issue was whether a *guardian* could stand in the place of counsel to effectively advise and assist the juvenile. But it is exactly this questionable procedure Relator is attempting to force upon Judge Kinder, Mr. Moyers, and appointed counsel. The juvenile's competency was not in question in ***D.L.***, only his ability to make informed and knowledgeable legal choices. The question was whether effective assistance of counsel could be surrendered upon appointment of an untrained guardian who assisted the juvenile in waiving the presence of counsel.

In the absence of the person's competency to understand and assist his attorneys, which may well be the situation in Mr. Moyers' case, counsel cannot be effective. ***Frawley***, ***supra***.; ***In the interest of J.C., Jr.***, ***supra***. Appointment of a guardian does not necessarily make counsel effective if

the guardian cannot assist counsel in the preparation of the defense. Mr. Moyers' appointed counsel is a well-trained, highly-qualified, and fully competent attorney, but that alone does not equate to *effective* representation. Effective representation comes from counsel's ability to prepare for *this* trial and to meet the State's evidence in *this* case, an ability she is denied if Mr. Moyers in unable to assist her in that effort.

Relator's disdain for Mr. Moyers' right to due process of law before his liberty is stripped away is clearly expressed by his suggestion that "If [Mr. Moyers] is found to be a sexually violent predator, he will be treated – *treatment that might well enable him to provide additional assistance to counsel at the future hearings the law provides him.*" (Relator's Reply Br. 5) (emphasis added). The statutes cited by Relator control the procedure by which a sexually violent predator is released from secure confinement after the initial commitment (Relator's Reply Br. 5). Relator is willing to deny Mr. Moyers effective assistance of counsel simply to gain his confinement now, with the jaded "promise" that he may later gain his release if he becomes competent enough to assist his attorneys and demonstrate that he should

not be confined. "Justice delayed is justice denied." ***Bazzell v. Bazzell***, 907 S.W.2d 328, 329 (Mo. App., E.D. 1995).

Relator erroneously re-interprets Judge Kinder's Answer to suggest that Mr. Moyers "implicitly concede[s] that due to his mental illness, Moyers will always be more likely than not to commit sexually violent acts." (Relator's Br. 13). No such concession exists in the Answer. Judge Kinder's Answer points out that the mental disease or defect required for a finding of incompetency is distinct from the mental abnormality required for commitment as a sexually violent predator. Dr. Mandracchia noted that Mr. Moyers' mental disease or defect may have interfered with his ability to complete the MOSOP program (Exhibit E). If that mental disease or defect also prevents Mr. Moyers from benefiting from the "treatment" offered by the Sexually Violent Predator Treatment Program, Mr. Moyers' mental disease will never be "cured" and any distinct "mental abnormality" found will never change such that he could be released from secure confinement.

Relator disregards the mental illness that may render Mr. Moyers incompetent to proceed to trial and treats it as though it is not substantially different than the "mental abnormality" necessary to establish that he is a SVP. Mr. Moyers is rendered incompetent to proceed to trial if a mental

disease or defect leaves him unable to comprehend the nature of the proceedings or to assist his attorney. He suffers a "mental abnormality" for purposes of the SVP statutes if he has a congenital or acquired condition affecting his emotional or volitional capacity predisposing him to commit sexually violent offenses. Section 632.480(2), RSMo 2000. Each of these mental conditions is distinct, and that distinction cannot be disregarded as Relator suggests. Mental health treatment to restore a person to competency, if that can be achieved at all, is not the same treatment that will be provided to correct an SVP's mental abnormality. In every SVP case the state's expert witnesses describe that "treatment" as educating the person to accept responsibility, to acquire empathy for his victims, to learn his "offense cycle" in order to recognize the triggers for his offending, and to prepare a relapse plan to assist in avoiding risky situations once released in the community. How does this restore an incompetent person's ability to understand the proceedings or his ability to assist his counsel in the preparation of a defense? The obvious answer is this "treatment" in no way restores Mr. Moyers or anyone else to competency. Relator proceeds in this case as if one mental condition is the same as any another, as if one civil commitment is premised on the same condition as any other commitment,

and one type of mental health treatment is the same as any other. That is simply not so.

What interest, i.e. irreparable harm, does the State of Missouri have in committing an incompetent person to a program not designed to provide him with kind of treatment that might be effective in restoring his competence? Relator's position, stripped to its bare bones, is that he seeks the power to incarcerate mentally ill ex-offenders he knows will never benefit from specialized SVP "treatment" and will, therefore, be incarcerated for life.

The only cases of which Judge Kinder is aware directly addressing the question of competency under a sexually violent predator law are ***Detention of Cubbage***, 2003 WL 22669110 (Iowa); and ***Detention of Garrett***, 2003 WL 22673767 (Iowa). ***Garrett*** simply followed the holding in ***Cubbage***, so only that case will be discussed. Both cases are contained in Respondent's Substitute Appendix. The Iowa Supreme Court held that an SVP respondent has neither a constitutional nor statutory right to be competent to proceed at trial. (Appendix 39, 40). Interestingly, the Iowa Court relied, at least in part, on the holding of the Western District Court of Appeals in the pending appeal to conclude that the appellant had no fundamental

constitutional right to be competent to stand trial. (Appendix 40). More importantly, from Judge Kinder's perspective, was the analysis by the Iowa Supreme Court regarding the lack of a statutory right to competency. The Iowa statute specifically addresses the situation where a person has been previously found incompetent to proceed in a criminal trial. Section 229A.7(1), Iowa Code (2001). That section requires the trial court to hold a pre-trial hearing to determine if the person actually committed the underlying crime where, "the person charged with a sexually violent offense has been found incompetent to stand trial and the person is about to be released pursuant to [statute], or the person has been found not guilty of a sexually violent offense by reason of insanity…." ***Id***. Notably, the Missouri SVP law makes no provision for a pre-trial hearing under similar circumstances to decide whether the person actually committed the prior offense alleged by the State. Section 632.483.1(2) allows the State to proceed with an SVP action against someone previously found not guilty by reason of a mental disease or defect, but it requires no finding, beyond a reasonable doubt as required by Iowa, that the person actually committed the crime. And more particularly to the question here, the Missouri SVP law is silent regarding a prior finding of incompetency to proceed to trial.

It was the specific references in the Iowa statute to which the Iowa Supreme Court turned to decide that the appellants had no statutory right to be competent in the SVP proceeding. "The only provision in the statute that arguably – and, the State asserts, implicitly – evinces legislative intent in relation to competency is Iowa Code section 229A.7(1) (2001)." Unlike the Missouri law, the Iowa statute makes specific reference to the question of competency. The Iowa Court noted that its state law further provides that, "[a]t the hearing on this issue, … all constitutional rights available to defendants in criminal trials, *other than the right not to be tried while incompetent*, shall apply." (Appendix 40-41, fn. 1). From this language the Iowa Supreme Court concluded that its legislature anticipated SVP cases where the person was previously incompetent to stand trial, and continued to be incompetent. ***Id.*** It was also this specific statutory language which lead the Iowa Court to reject the right to be competent because "the legislature has specifically stated that the alleged perpetrator has no right to be competent." ***Id.***

No similar recognition of incompetency and no specific denial of the right to competency can be found in the Missouri law.

Judge Kinder understands the differences between the mental conditions presented by the case before him. He recognizes Mr. Moyers' statutory right to counsel and the concomitant right to effective assistance of that counsel. Judge Kinder acted fully within his authority over a matter arising from the case under his jurisdiction. He has not abused his discretion, acted outside his authority, nor subjected the State to irreparable harm. A writ of prohibition or mandamus does not lie.

Because Judge Kinder has not acted outside of his authority in staying the proceedings to determine Mr. Moyers' competency to stand trial, Relators Petition in Prohibition and Mandamus should be denied.

CONCLUSION

Because Judge Kinder has not acted outside of his authority in staying the proceedings to determine Mr. Moyers' competency to stand trial, Relators Petition in Prohibition and Mandamus should be denied.

Respectfully submitted,

_____

Emmett D. Queener, MOBar #30603
Attorney for Respondent
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855

Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,201 words, which does not exceed the number of words allowed for a respondent's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in February, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ___ day of _____, 2003, to James R. Layton, State Solicitor, P.O. Box 899, Jefferson City, Missouri 65102-0899.

_____

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel. JEREMIAH W. NIXON, Attorney General, Relator, v. THE HONORABLE BYRON KINDER, Circuit Judge, 19th Judicial Circuit, Cole County, Respondent.	)	Cause No. SC 85633

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
NINTEENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE BYRON KINDER, SENIOR JUDGE

RESPONDENT'S SUBSTITUTE APPENDIX

Emmett D. Queener, MOBar #30603
Attorney for Respondent
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855

FAX (573) 875-2594

TABLE OF CONTENTS TO APPENDIX